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Supreme Court, U. S.
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No. ....

IN THE

Supreme Court of the United States

October Term, 1980

DOROTHY SILVERMAN, Administratrix, Estate of FRED R. SILVERMAN, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Questions Presented.

Dorothy K. Silverman, Administratrix of the Estate of Fred R. Silverman, Deceased,[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above Appeal on June 16, 1980 (Appendix B), after petitioner's timely Petition for Rehearing En Banc was denied on August 21, 1980 (Appendix C).

References to the record will be abbreviated.[2]

The key and general question and issue to be determined is the construction and application of the federal statutes of limitation on federal estate taxes in decedents' estates in all the states and particularly in California and all other states

[1]Los Angeles Superior Court No. P 472745.

[2]It is a 3 volume Clerk's Transcript. References will be I-R and II-R to the opinion — Op; to respondent's opening brief on appeal — Ob; to petitioner's brief — RB; to the Appendix — Ap., followed by page numbers.

having similar probate law. *First impression points and clarification are critically involved.*

In this case, the California estate has been pending since 1963, respondent has had full knowledge and Special Notice (it requested) of all proceedings therein; it made its assessment for estate taxes in 1964 (26 U.S.C. §6501(a)), but neither levied nor filed "a proceeding in court"[3] *to collect the taxes within 6 years from the assessment* (26 U.S.C. §6502(a)(1)). It did not file such action until December 6, 1976, in this case, *more than 12 years after the assessment*, although respondent finally admitted (after years it contended otherwise), and although the Court of Appeal holds, respondent could have filed the action "immediately" after the assessment.

The Court of Appeals holds, in the first such construction of the federal statutes of limitation:

That although 26 U.S.C. §6502(a)(1) provides, *disjunctively*, that the "tax may be collected by levy *or* by a proceeding in court, but *only* if the levy is made *or* the proceeding *begun* — (1) within six years after the assessment of the tax or the period fixed by a written agreement of extension"[4] and although 26 U.S.C. 6503(a) provides, *again disjunctively*, "the running of the period of limitations *provided in 6501 or 6502* on the making of assessments *or* the collection by levy *or* a proceeding in court . . . shall be suspended for the period during which the Secretary or his delegate *is* prohibited from making the assessment *or* from collecting by levy *or* a proceeding in court." (emphasis added) and although 26 U.S.C. 6503(b) provides that the "period of limitations on collection after assessment *prescribed in Section 6502* shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States, or of any State, or of the District of Columbia, and

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[3]That means a civil action in a court of general jurisdiction.

[4]There was no such agreement.

for 6 months thereafter *and for 6 months thereafter*'' (emphasis added):

The Court holds the statute of limitation is completely suspended as long as respondent is prohibited from doing *both*, i.e., *from levying as well as filing an action*, and although it could have filed the action immediately after assessment, unless it could also levy the suspension continues.

It said *''Both must be available before it can be said that collection procedures are unhindered''* (Ap. 10).

First, that is diametrically opposed to respondent's contentions made in the District Court.[5]

The Court's construction was substantially influenced, if not based, upon the Court's consideration and interpretation of how the Secretary and his delegates consider and apply 6503(b).

Respondent's position not only in the instance noted, but its other explicit concessions in the record (after years of consultation and research on the matter as to which it should have been well versed) is *contrary to the Court's construction.*

The assessment was timely made November 27, 1964; the 6 years under 6502(a)(1) expired November 26, 1970.

6503 is an entire section with subparagraphs (a) through (g). 6503(a) provides for suspension of the limitation period in *6501*[6] (assessment) and *6502* (collection by levy or suit)

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[5]It stated on its motion for summary judgment its clear statutory *duty* regarding the collection of taxes, (I-R 59, ll 20-25) ''the basic purpose of the statute of limitations *is to require the government to act pursuant to its assessment within the 6 - year period.* The Government must *either* attempt to reduce the property subject to the general lien of Section 6321 of the Internal Revenue Code (26 U.S.C. §6321) to its possession by means of its levy powers, *or* it must proceed in a court to collect the tax'' (emphasis added).

[6]6501(a) provides the assessment shall be made within 3 years after the return (706) is filed.

only when the assessment *or* the levy *or* the suit are prohibited. This is logically related to 6503(b) and it is suspended while the taxpayer's assets are "*in the control or custody*" of a court. It is implicit in the last clause that is because the nature of the control or custody is such the assessment *or* the levy cannot be made *or* a suit filed.

Implicit in the "control or custody" of 6503(b) is that it be of such a nature that the assets cannot be reached and that includes by suit. If they can be reached by suit, then it is not that obstructive control or custody.

The general importance of the matter is apparent from its universal application of all decedents' estates.[7]

A more synoptic statement of the questions involved is most difficult in view of the broad scope of respondent's contentions, and the variety of factors which are determinative of two important points.

Those two points are, first, the California Probate Court in California decedents' estates, generally, *does not have such "control or custody" as to obstruct or prohibit civil actions based upon post-death obligations (federal estate taxes are such) or the imposition of a variety of liens and levies;* (2) *federal taxes, including estate taxes, are the creatures of federal law and all substantive and remedial rights involved are exclusively determined by federal law; federal law regarding federal estate taxes is supreme, and is not affected by any state law as to procedure (United States v. Summerlin (1940) 310 U.S. 414); exemption of property from federal taxes is determined exclusively by federal law (United States v. Mitchell (1971) 403 U.S. 190); the only property exempt from federal taxes is property so declared exempt by federal statute (26 U.S.C. §6334(a)*

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[7]There is the universal policy that such estates should be closed expeditiously for the benefit of the survivors for obvious reasons. However, respondent considers the policy in bankruptcy of the financial rehabilitation of the bankrupt of *an importance which allegedly does not exist in probate proceedings* (OB 33).

through (c)); assets in a decedent's estate are not listed as exempt property by federal law.

Also necessarily involved, because of respondent's complete misstatement of it, is the California law regarding decedent's estates and its relation to and effect on federal estate taxes.

Most importantly involved is the special status of the estate in this case, in that on March 12, 1968, petitioner recovered judgment in equity adjudicating her the owner of all the property.[8]

The District Court, upon the record, determined that the estate in this case did *not* involve such "control or custody" in court as to prohibit either suit or levy and respondent could have sued or levied within the six years.

Among the omissions in the opinion, the Court did not decide *the issue of whether there was such "control or custody";* or whether levy could be made within the six years; it was completely silent as to the special status of this estate under the equity judgment.

Respondent insisted that its claim for the taxes filed in the estate was the "commencement of a proceeding in court" which tolled the six year statute of limitations. *California law is that federal estate taxes do not come within the California probate creditor's claim procedure; that said procedure only requires claims based upon decedent's lifetime obligations; that federal estate taxes are not such.*

Instead of so stating, thereby giving a clear guideline as to all future federal estate taxes regarding California probate estates, the opinion concludes that filing the claim did not commence a proceeding in court, *but did not state that no such claim was necessary and did not come within the California creditor's claims statutes.*

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[8]The judgment effectively "removed" all the property from the usual probate estate proceeding. Probate estates involve testacy, intestacy, testamentary and some inter-vivos trusts. *None of them existed in the estate after the equity judgment.*

That leaves a clear implication to future parties such claims are required and will lead to repetition of the history of this case.

This Court's consideration of this case will establish a landmark guideline for the benefit of all decedents' estates as well as respondent.

On July 24, 1975, respondent's counsel, Gregory A. Robinson, appeared on a hearing in the estate in which the Court announced orally an order and direction to petitioner (repeated in its written order of July 28, 1975) by which she was "*. . . instructed and authorized to take whatever action may be necessary to oppose the claim of the United States Government for taxes against this estate.*" (I-R 127-9.)

Parties.

They are petitioner, who was defendant-appellee and respondent, who was plaintiff-appellant.

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Opinions Below.

The District Court did not write an opinion. It entered Summary Judgment for petitioner. (I-R 254).

The opinion of the Court of Appeals (Appendix A) is reported in 621 F.2d 961.[1]

Jurisdiction.

This Court's jurisdiction is invoked under 28 U.S.C.A. §1254(1). This petition is timely filed pursuant to 28 U.S.C.A. §2101(c) and this Court's Rule 20,4, i.e., within 90 days after the denial of the timely Petition for Rehearing on August 21, 1980.

Jurisdiction of the Court of Appeals is based on 28 U.S.C.A. §1291; that of the District Court in the first instance is based upon 28 U.S.C.A. §§1340, 1345; 26 U.S.C.A. §§7401, 7401(a) (III-R Supp 271).

Statutes Involved.

Directly involved on the appeal and in the opinion of the Court of Appeals are 26 U.S.C.A. §6324(a)(1), §6334(a) through (c), §6501(a); §6502(a)(1), §6503(a) (b).[2]

Statement of the Case.

1. Relevant Background:

Petitioner and decedent were married November 10, 1932 until his death on August 18, 1963. On December 16, 1943, they executed a contract to make irrevocable wills leaving all their property (all community) to each other and appointing each other executor and executrix without bond. They made such wills, and petitioner relied on said contract and wills. However, decedent went to the trust department

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[1]It reversed the judgment and remanded to determine whether under the opinion respondent "is entitled to prevail" (App. 4).

[2]The same are set out in Appendix D, including all §6334 and all §6503.

of the Union Bank regarding a new will, was referred to an attorney he had never met and never saw since, and executed a new will dated May 2, 1958. It did *not* leave all the estate to her, but only part (the other to his sisters and nieces); it did *not* appoint petitioner executrix, but the bank as executor; the estate consisted principally of Union Bank stock, traded over the counter; the will created a testamentary trust (never effective) with the bank as trustee and "froze" the stock for 5 years. The bank petitioned to probate the will and for its appointment as executor. Before the hearing, it was informed of the contract but consistently refused to recognize it. The will was admitted and executor appointed on September 27, 1963. The assets consisted of 10,000 shares of the bank stock at $79.79 per share at death and in excess of $100,000 cash, all in decedent's name. On February 7, 1964, a dividend of 2,000 shares was received. Petitioner had no funds at all; no bank account; all the assets were in the possession of the bank; no estate income was ever distributed to petitioner during the executor's tenure. She was compelled to obtain a limited family allowance in 1964. She was militantly opposed in that and *all* proceedings by the other heirs and the executor (who should always be completely impartial). Petitioner filed two actions in the Los Angeles Superior Court, one to quiet title to the stock and the other for quasi-specific performance of the contract, against the executor, as such, and the other heirs. All militantly opposed her. On March 12, 1968, she recovered an equity judgment, mentioned supra.[3]

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[3]The judgment adjudicated the contract valid, the will in violation of it and of no force or effect against her as to its dispositive provisions, but effective as to the appointment of the executor; it took under the contract and not the will; the executor held all the property for her under a constructive trust and all to be distributed to her under the contract and not the will.

Neither the executor nor the other heirs appealed, and the judgment became final as to them 60 days after its entry.[4] Petitioner appealed only from that portion of the judgment which failed to enforce the part of the contract as to her appointment as executrix. Pending the appeal, she petitioned for removal of the bank and her appointment as executrix and the court so ordered on June 27, 1969. Under the equity judgment she owns the assets *individually*. On her appointment as administratrix, she became the "trustee" of the constructive trust in place of the executor and the interests of the "trustees" and "beneficiary" vested in her.

On appeal,[5] the court affirmed with a pragmatic decision that the appeal ". . . as a practical matter, deals *solely* with the fees paid or yet to be paid for services rendered by the bank as executor and its attorney *prior* to its resignation" (emphasis added).[6]

At petitioner's request, the assets were deposited in a depositary account (Pr. Code 541.1).

2. Respondent's Knowledge of All Estate Proceedings:

As noted, on October 20, 1965, respondent filed a Request for Special Notice of all estate proceedings; it admitted it received all of them (I-R 50).

These included the Order of June 27, 1969 appointing petitioner administratrix; Order of August 28, 1969 making partial distribution of *one-half the stock and* $50,000 cash to the petitioner *individually*; order of June 1, 1972 trans-

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[4]California Rules of Court, Rule 2(a).

[5]Silverman v. Union Bank (1971) 21 CA.3d 357, 98 CR 332. Of special interest to lawyers, judges and law professors, is the unprecedent adjudication of a contract as completely valid but failure to enforce it completely, although within equity jurisdiction.

[6]"Resignation" is incorrect. Faced with the petition to remove it, the executor offered its *qualified resignation* which was ineffective (Waterland v. Superior Court, 15 C.2d 34, 98 P.2d 211).

ferring $35,000 to petitioner's account; the executor's and its attorney's accounts and petitioner's objections, which led to the order of May 16, 1973 awarding a total of $54,300.60 to the executor and its attorney principally for extraordinary services *rendered* on their behalf and most of which was rendered after their removal (contrary to settled law and the limited period fixed on her said appeal) and 90% of ordinary statutory commissions and fees to them on (the erroneous basis the estate was 1/10 from closing!) Also included was the order awarding the executor's former attorney $2,250 for services rendered regarding the said dismissed appeal (after his removal and on his own benefit.) Also petitioner's petition (for instructions as to *closing* the *estate*) heard on July 24, 1975, attended by petitioner, her business advisor and her attorney, and Robinson for respondent. Robinson heard the oral order to oppose the taxes. Respondent was always familiar with the estate and the executor's banking activities, the performance of his stock which decreased from $79 per share at death to about $25 at one time.

After the hearing on July 24, 1975, said persons conferred in the hallway.[7]

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[7]Petitioner's attorney discussed the statute of limitations, requested resolution, inquired whether it could be stipulated if petitioner paid under protest on the basis of a claim for refund she would not be jeopardized to raise the statute of limitations defense; Robinson stated he would determine it but suggested the preferable solution would be for respondent to sue; petitioner referred to the taxpayers' inability to file for declaratory relief or other action; he stated the 706 was based on then facts and figures and if finally determined the taxes were not barred, the 706 would be amended and supplemented to include all subsequent deductions; Robinson stated that would be done when respondent sued; however, William J. James, respondent's attorney in the District Court, stated he would oppose that. There have been subsequent orders for funds with special notices to respondent.

3. The Pleadings:

These were petitioner's original and amended complaints[8] and petitioner's answer to the amended complaint.[9]

4. The Proceedings:

As noted, they were all pleading and motion proceedings, ending in petitioner's summary judgment (I-R 56-II 255)

The District Court, as partially noted supra, determined that to continue the suspension "*during the pendency of a state probate proceeding could allow the United States an unreasonably long time in which to collect its taxes — in this case, for example, perhaps over 20 years*". (II-R 246)

The estate has been pending for more than 17 years, cannot be closed pending this tax controversy.

There were for years considerable communications between counsel, petitioner's attorney urging resolution of the issue of the statute of limitations.[10]

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[8]The only difference was in the amount of the assessment. It alleged assessment, filing of claims for the taxes in the estate and "at all times since the assessments . . . the assets . . . have been in the custody and control of the Superior Court." (I-R 1-8)

[9]It traversed material allegations of the complaint and alleged five affirmative defenses: 1, no claim stated; 2, the 10 year statute of limitations; 3, the 6 year statute of limitation; 4, equitable factors and estoppel (*not laches*); 5, if finally determined the action was not barred, request to amend and supplement the 706 to include subsequent deductions and credit. (I-R 9-16).

[10]These included the conference on January 30, 1974 when respondent's attorneys stated if the taxes were not paid by February 24, 1974, respondent would sue. Nine letters from April 29, 1974 to December 30, 1975 in which respondent argued its claim had been approved by the probate court. It persisted in this contention, but finally admitted its claim had *not* been approved. (I-R 36-37) Petitioner's attorney, wrote Robinson on March 25, May 29, December 14, December 30, 1975 concerned about resolution. The December 14 letter stated "the government has had years to proceed and it has been months since you advice it would proceed." The December 30 letter stated "I've expressed my opinion several times regarding the Government's delay and disregard of my client's rights in the administration of the estate". *24 days short of one year later this action was filed.*

Respondents answered interrogatories, that it had no record of appearances on its behalf (although acknowledging receipt of Special Notices) including Robinson's appearance on July 24, 1975, noted supra. Yet the correspondence between counsel referred to that appearance and the order of July 28, 1975 stated it.

Argument.

This case was decided and is reviewable *on the record before the District Court.*

The opinion was based upon serious errors of fact of record and of the applicable law, including complete silence regarding, and omission of, determinative facts as well as serious questions of law fully submitted.

These were specified in petitioner's Petition for Rehearing En Banc. These will be noted in consideration of the opinion infra. However, noted here for focus, this case involves the most extreme dilatory tactics by appellant (RB 1-7), its knowledge of all proceedings in the estate (RB 7-10), its change of position (and conflicting statements) as to the facts of record and the applicable law, including regarding federal estate taxes, of which it is and should be correctly informed (RB 10-13); the history of extreme unfairness and injustice to the petitioner, the widow, including the relevant conduct of the executor and respondent (RB 4-13), the equity judgment, petitioner's affirmative defenses, *and petitioner's submission as an issue the standard of conduct in litigation equally applicable to the government as well as to individuals and lay entities* (RB 12).

In that regard, petitioner submitted, "Men must turn square corners when they deal with the government." Justice Holmes in *Rock Island A & L Rd* v. U.S. (1920) 254 U.S. 141, 3 and "If men must turn square corners, when they deal with the government, the government ought to turn square corners when dealing with its citizens." *Hobert v. Penrose* (1930) 38 F.2d 577, 81.

Appellant raised two principal points on appeal: 1, filing its claim with the estate commenced a "proceeding in court" on October 20, 1965 and was within the 6 year statute (6502(a)(1)); 2, the 6-year statute was suspended because the assets of the estate were "in the control or custody" of

the court and *said suspension began with the assessment and continues to the end of the administration of the estate.*

The last statement is incomplete since 6503(b) states the suspension is during the time of the "control or custody" of the court, *and 6 months thereafter.* According to respondent, *that would mean six months after a decedent's estate was closed.*

No estate could be closed under such construction since after being closed, the addition of the 6 months thereafter is meaningless.

Respondent has repeatedly contended that "control or custody" under 6503(b) runs from the beginning of the estate proceedings to their close. It did so unsuccessfully in various cases including *McAuley v. United States (CA 1975) 525 F.2d 1108; United States v. Verlinsky (9 CA 1972) 459 F.2d 1085; United States v. McCann (Cal. 1966) 259 F.S. 632.* (bankruptcy cases)

1. Respondent's contention regarding its claim filed in the estate.

It made various extensive contentions regarding the alleged California probate creditors' claim procedure, completely incorrect, despite petitioner's repeated submission of the correct law, despite the fact that the correct law is easily ascertainable by reading the California Probate Code and its annotated cases. *Its own GCM (Ap 20) indicated otherwise.*

The substance of respondent's contention was: claims for federal taxes were required to be filed in California decedents' estates; although its claim was not filed within the statutory six months it was still in time since the California claims statute of limitation did not govern federal estate taxes, *correctly citing United States v. Summerlin, supra,* (involving a Florida probate) and the *Matter of Feinberg (1966) 18 N.Y.2d 490, 223 N.E.2d 780* (involving a New York probate); that the government is not controlled by

limitation time for filing; respondent first contended it had been approved, but later admitted it had never been approved; that there was no California general statute of limitations on the obligation to pay taxes; that it complied with 6502(a).

Respondent cited numerous California and federal cases and miscited various California texts, omitting critical paragraphs contrary to its position, all of which petitioner digested in the RB. All of respondent's complex presentation was completely incorrect and completely irrelevant.

Petitioner has always contended and contends that respondent has not been helped or hindered by the California probate creditors' claim procedure; that it is inapplicable, that respondent is exclusively governed regarding the federal estate taxes by federal statutes only; that so governed, respondent is barred.

The claims required to be filed in California decedents' estates are claims based upon decedent's lifetime obligations. 1 Condee, Probate Practice, Sect. 745 p. 742 n. 17, hereinafter 1 Condee.

Repospondent cited numerous sections of 25 Cal.Jur.3d indicating its study of them, including section 609 (covering the time for presenting or filing claims in general). Significantly, respondent did *not* cite or quote the following: "*Nor does the statute apply in the case of the claim of the United States for taxes.*" (p. 56 n. 7)

This is obvious from the nature of the federal estate tax. It is not a debt of decedent because it does not arise during his lifetime. It can only arise on his death. The special estate lien is created at the time of death. 26 U.S.C. §6324(a)(1).[11]

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[11]That tax is not an inheritance tax, nor a property tax. It is a tax on the transfer of property, i.e., the vesting of title *on death* by operation of law to the person entitled to the ownership. *It is an excise tax.* United States v. Mitchell, supra. It is "a tax on the interest which have shifted, an excise on a transfer of an estate on death of the owner. It does take the survivor's property to pay the tax." 2 *Condee Sec 1287 pp. 230-1.*

Accordingly, the claim for the federal estate tax is not a claim provided to be filed in California decedents' estates.

Respondent made extensive argument assuming the claim was *required to be filed in the estate.* As noted, all that argument was irrelevant.

Even as to claims which are required to be filed respondent's argument was wrong.

The claim which is *required* by statute to be filed in California estates (Pr C 707, 707.5) do *not* include any federal taxes) had to be filed within six months from the date of first publication of notice to creditors, i.e., within six months from October 1, 1964.

If not filed within that time "it is barred forever." The bar cannot be waived. If the judge allows it, it is reversible error. *The representative and the court are duty bound to raise the statute of limitations. Pr C 708; Estate of Smith, 122 CA.2d 216, 264 P.2d 638. That is why the order of July 28, 1975.*

The late filing of a required claim deprives the probate court of jurisdiction. It cannot act. This was recognized in United States v. Summerlin, supra.

However, the fact that the California probate court is without jurisdiction does not affect the government from enforcing its federal estate taxes under federal law. United States v. Summerlin supra; Matter of Feinberg, supra.

Respondent's contention that filing the claim constituted "a proceeding in court" is incorrect. First, because its federal estate taxes were not a claim required to be filed and therefore were without the California statutory procedure; second, even as to required claims (claims based upon decedent's lifetime obligations), filing the claim *does not commence "a proceeding in court."*

Again, regarding respondent's conduct, it cited numerous sections of 25 Cal.Jur.3d including 665, but not 664, which

was on the opposite facing page and readily visible in reading 665.[12]

Berger explained, 41 C.2d 734, 264 P.2d 13, that CCP 350 provides "an action is commenced, within the meaning of this title, when the complaint is filed." "the probate court has no jurisdiction of an action on a claim." 20 Cal.Jur.2d §29, p. 49. Similar provisions were similarly determined in Matter of Feinberg, supra, and in United States v. Saxe (1 CA, 1958) 261 F.2d 316 (involving Illinois probate).[13]

2. Respondent's argument regarding the statute of limitations:

Respondent's argument was extensive, changed its contentions and position and was uncertain, inconsistent and conflicting regarding the federal estate taxes.

To make a disciplined analysis of it, petitioner will consider it fully in the following sequence.

Prefatorily, respondent's argument relates to the factor of "control or custody" of the court, and assumes that it existed, of a nature and to an extent that it obstructed levy and suit (originally), but faced with the fact that it filed the action in 1976, whereas it could have filed it in 1964, it sought to emphasize the alleged unavailability of levy.

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[12]Section 664 reads: "The mere filing of a claim against a decedent's estate with the probate court does not amount to the commencement of an action on the claim within the meaning of the statute of limitation in view of the statutory provision that an action is commenced when a complaint is filed. Presentment of the claim is merely a demand of the estate as such, preliminary to and a predicate for action if the claim is rejected." Citing *CCP 350* and *Berger v. O'Hearn, 41 Cal.2d 729, 264 P.2d 10.*

[13]Feinberg stated, 223 N.E.2d 780, 4, "Similarly, when local rules provide that a notice of claim, without more, will not bring the matter into court, filing such a notice for unpaid federal taxes has failed to save the claim from being barred (see United States v. Saxe, 261 F.2d 316, supra)".

However, as noted, it did not contend that unless both remedies were available, the statute was tolled. As noted and quoted supra, it stated the statute of limitations required it "to act pursuant to its assessment within the 6-year period" and that it "must *either* attempt" to levy or to sue. (I-R 59, lines 20-25).

Respondent also stated "the *duty* of the United States in regards to "beginning a proceeding" in California is completely met by the filing of its proof of claim." (emphasis added.) (II-R 177 ll 23-5)

Respondent contended the probate court has obstructive "control or custody" because it allegedly has exclusive possession and exclusive right to determine distribution, *i.e., what property goes to whom.*

That is incorrect. The probate court does not convey title by its distribution. Its decree merely evidences the fact that title has passed by operation of law at the time of death, not because of or through administration of the estate.[14]

As noted, the federal estate tax is on the transfer of property to the transferee on death and is payable on that property by the transferee. The representative and the heir are personally liable. That interest of the heir, in all decedents' estates, is subject to reach, including by imposition of liens.[15]

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[14] "*It is elementary that a decree of distribution does not convey title to the assets of an estate.*" The authority cited here continues that title vests on death subject to the representative administering for the purpose of paying debts, expenses of administration and other charges. "*However, such control of the property by the probate court is not the equivalent of exclusive jurisdiction over it, to the exclusion of any jurisdiction thereover by other courts in proper actions.* Mears v. Jeffry, 80 CA.2d 610, 188 P.2d 294." 24 Cal.Jur.3d, p. 196, fn. 4 (emphasis added).

[15] "The Superior Court sitting in probate *does not possess exclusive jurisdiction* over certain matters that concern an heir's interest in the estate . . . an heir's interest in the estate *can be impressed* in an action in the Superior Court not sitting in probate, *with a lien* to secure an obligation to support, even though the estate is still being administered . . ." 24 Cal.Jur.3d §101 p. 197; Reed v. Hayward, 23 C.2d 336, 144 P.2d 561.

There are numerous actions against estates (their representatives) regarding title and possession to property including foreclosure of mechanic's, mortgage and other liens. 1 Condee Sec. 745 pp. 471-2; 24 Cal.Jur.3d, §100-109.

Respondent's argument misstated the *nature of a decedent's estate*. It is not a legal entity "but is merely a name to indicate the sum total of the assets and liabilities of a decedent . . . it is not a corporation . . . it cannot sue or be sued."[16]

It is not a citizen of any state. Gallivan v. Jones (9 CA) 102 F. 423.

Respondent also misstated *the nature of probate administration*. "Generally, 'administration' means *management* of a decedent's estate by an executor or administrator". 20 Cal.Jur.2d §12, p. 36; 24 Cal.Jur.3d §74, p. 151; 1 Condee Sec. 794, p. 519.

Respondent also misstated the *nature and status* of *probate proceedings*. They are special in nature; they are not actions at law either under the constitution or code. 20 Cal.Jur.2d §12, p. 36; 24 Cal.Jur.3d §74, pp. 151-2.

It also misstated, as partially noted, *probate jurisdiction*. The probate court as such has no jurisdiction over any actions. Proceedings, intra-probate administration are not actions.

Respondent stated that probate jurisdiction was exclusive. *It is not*.

This is submitted apparent because of the limited, special, almost ministerial procedures in probate. The representative's possession is merely ministerial, he has no property interest, he is an officer of the court without any "sovereign

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[16]20 Cal.Jur.2d §11-14, pp. 35-41; 25 Cal.Jur.3d §60-61, pp. 131-4; 1 Condee Sec. 794, p. 59.

power''; he is a mere ''stakeholder'' and acts under instructions. 24 Cal.Jur.3d §88, p. 169.

The probate court's ''control and custody'' of property is also *merely procedural to direct the representative* to marshal the assets, determine liabilities and manage the estate.

At no time is title vested in anyone but those entitled to receive it by operation of law. The court has no officer who has title to it as in bankruptcy (in which a trustee has title) and in receiverships (in which many receiverships have statutory title).

Nor is the probate court, nor the representative, vested with ''immunity'' such as in bankruptcy and receivership which block litigation against the estate.

There is *no* time during the administration of a decedent's estate when an action cannot be maintained against a representative for obligations and for causes of action arising *after* death without any prerequisite to such action and with no obstruction. The only qualification for litigation against the representative relates to decedent's lifetime obligations as to which the claim procedure applies.

By its very nature, probate jurisdiction is not exclusive except only in the intra-procedural matters.

''. . . the court's jurisdiction over the assets *is not exclusive for all purposes*, so as to deprive other courts of any jurisdiction thereover in proper actions . . .'' 24 Cal.Jur.3d §100, p. 196.

Actions for quasi-specific performance of contracts to make testamentary provision are in equity not in probate. Such was petitioner's action which resulted in the equity judgment. Equity determines by such judgment ownership of the property.[17]

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[17]Silverman v. Union Bank, supra, Brown v. Superior Court, 34 C.2d 559, 65, 212 P.2d 878, 82; Ludwicki v. Guerin, 57 C.2d 127, 30, 17 CR 823, 25.

"*Courts of equity will interfere in the administration of estates* where the powers of the courts of probate and their modes of procedure preclude them from doing complete justice, and then only for the purpose of rendering indispensable aid to courts of probate remitting their decrees to that court to be carried into effect." Estate of Rolls, 193 C.594, 99, 226 P. 608, 10.

Equity has plenary jurisdiction and its decrees are enforceable by whatever means equity is required to devise for that purpose. It is not bound by precedence. Equity tailor-makes remedy. The Times-Mirror Co. v. Superior Court, 3 C.2d 309, 31, 44 P.2d 547, 57.

This applies particularly to federal district courts which have equity jurisdiction regarding federal tax. Markham v. Allen, 326 U.S. 490. United States v. Peoples Trust and Savings Co. (7 CA 1938) 97 F.2d 731.

If the California equity court can, as it did in Silverman v. Union Bank, adjudicate ownership of the property and separate it from the "probate" administration, federal courts can do so, with the additional supremacy of the federal laws on federal estate taxes.

If, as noted, California liens can be imposed on interests in estates, the more so federal tax liens in view of their supremacy.

3. Federal Law governs Federal Taxes:

As noted, federal law *exclusively* governs federal taxes. United States v. Mitchell, supra.

Federal tax laws "*are to be interpreted liberally in favor of the taxpayer.*" Bowers v. New York & Albany Co. (1927) 273 U.S. 346.

However, federal tax liens are entirely statutory and provisions for their collections are to be *strictly followed according to federal law.* United States v. Mosolowitz (1967) 269 F.S. 12.

As noted, 26 U.S.C. 6334(a) through (c) exclusively define what property is exempt from federal taxes. *All other property is subject to them.*

Pr C 950 provides for the order of payment (1) expenses of administration, (2) funeral expenses, (3) expenses of last illness, (4) family allowance, (5) *debts having preference by the laws of the United States*, (6) through (8) are irrelevant.

There is no conflict between the two jurisdictions since 6324(a)(1), the special estate lien, expressly provides that lien will be on the gross estate *except that part used for payment of charges against the estate and expenses of its administration.*

The Federal District Court has jurisdiction, including in equity, and the state law "cannot limit or deprive" it. United States v. People's Trust & Savings Co. supra; Markham v. United States, supra.

"Should the Government fail to bring suit against a taxpayer within the six years after assessment allowed by 6502, the Government is thereafter barred from foreclosing a tax lien on the property of the taxpayer." United States v. Besase (Ohio 1970) 373 F.2d 120.

The levy remedy has been seriously misstated and erroneously considered by respondent and in the opinion.

That remedy is initiated by a notice of levy which constitutes a constructive seizure. United States v. Cameron Construction Company, et al. (N.Y. 1965) 246 FS 859. *Levies for federal taxes supersede all state legislation regarding the property subjected to the levy; the federal law is "supreme"*. Hoye v. United States (9 CA 1960) 277 F.2d 116.

The state exemption statutes do not bind the United States. United States v. Heffron (9 CA) 158 F.2d 657. cert. den. (1947) 331 U.S. 831; United States v. Overman (9 CA 1970) 424 F.2d 1142, 6. ". . . the United States has not

looked to state law to decide how to enforce federal tax liens." United States v. Overman, supra, 424 F.2d 1146.

In Hoye, the notice of levy was served on the Los Angeles Controller for federal taxes on a public employee whose wages were exempted and protected by state law. The Controller sued to quash the levy. He failed.

There is no difference in federal taxes regarding their enforcement; if levies can be made on wages, they can be made upon any property, "whether real or personal, tangible or intangible." Seattle Association of Credit Men v. United States (9 CA 1957) 240 F.2d 906.

Federal levies are "self-executed." Hoye v. United States, supra, 277 F.2d 119.

United States v. Overman, supra, cited, in support of its holding noted supra, Aquilino v. United States (1960) 363 U.S. 509, 12-14.

4. The Opinion.

It is silent regarding, and omitted, determinative facts and it failed to decide serious issues of law including whether or not there was "custody or control" so as to toll the statute of limitations; it did not decide that a levy could not be made (i.e., a notice or levy could not be served upon the representative, petitioner, who in this case by the equity judgment was the adjudicated owner and primarily liable in any event).

Most seriously, both as to the levy phase and the construction that the *disjunctive* provisions of the statutes of limitations are to be read *conjunctively*, the Court *assumed* those were the interpretations and constructions by the Secretary and his delegates.

The irony is that the Court *speculates* upon the Secretary's speculation and non-judicial judgment regarding those matters.

For example, the committee reports, referred to, *speculate* that the reasons for suspension during "control or cus-

tody'' in a court in other situations, ''*perhaps*'' may apply to estates. This is an ipse dixit. There is no analysis, no standard for determining the state law regarding estates.

GMC is merely a counsel's opinion. Further, it supports petitioner in its relevant portion. A further example, the T.R. regarding 6503(b) considered in the Opinion (Ap. 10) that 6503(b) is suspended *only* when ''all or substantially all of the assets of the taxpayer are in the control or custody of a court.'' The statute makes no such standard. What is ''substantial'' and who decides it? Assuming respondent's sole objective is the collection of taxes, then, in this exercise, all that should be required is an amount to pay the tax.

However, that speculative process is completely contradicted by what respondent, *after years considering the matter, conceded of record*. Some of those concessions have been noted. It stated that it was required to act on its assessment with the six year period and it ''must *either* levy or sue — *not both*. Also, that it was its duty to begin a proceeding in court. It also admitted that it did not contend that it could not have enforced collection of the tax prior to the filing of the action in this case. Note, that it did not limit ''collection'' to either remedy. Further, (OB 27 fn. 2) it stated it was not prevented from ''obtaining a judgment establishing that taxes are due and owing, and obtaining payment of the judgment by having a probate court give it full faith and credit.''

The issue is most serious and of first impression, and is universally applicable. The Court has held in various cases the availability of property to federal levies for federal taxes and the supremacy of the latter. Although it does not expressly so state, by compelling inference, it holds that cannot be done regarding estates. That is incorrect. The more so as to the estate in this case.

The Court's reliance upon the administrative interpretations raises them to the dignity of legislation and permits

executive (administrative) legislation in the place of and inconsistent with regular legislation.

Despite its apparent reliance upon and the adoption of what it construes to be the administrative construction, it remains uncertain and confused and expresses it as follows: "Presumably," as to the purpose of 6503(b); "Congress *perhaps* then *believed* that the 'custody and control' of courts in those instances was sufficiently different . . . No explanation for the exception was given however."

Despite the elaborate and extensive semantics, the fact is that respondent levied regarding decedent's estates in Matter of Feinberg, supra, and in the United States v. Augsberger (1978) 78-1, U.S.T.C. Par. 9339 pp. 83-783-4.

Petitioner respectfully disagrees with the Court's treatment of Hoye v. United States (Ap 9) and McCauley v. United States, supra. (Ap 10) It states that Hoye did not hold that a federal levy "would supersede state probate proceedings." That is true *only* because probate proceedings were not involved. Property was involved and it makes no difference where property is located; it is subject to federal taxes unless exempt under federal law. The Court stated that the Controller was "a person", and it knew of no case holding a probate court to be "a person." The Court's point is obscure. It is fundamental and disclosed supra, that the probate court is not the target, nor the "estate" (which is not an entity), that all proceedings on *post-death* obligations are directed to the representative and the transferee (petitioner). There are express federal statutes for recovery of taxes from those "persons".

In its treatment of McCauley (Ap. 11-12), it refers to the "spirit" of that case. Petitioner discussed it in her brief. It is a simple case, i.e., how long the bankruptcy court's "custody and control" continued. Respondent, typically, contended the suspension was from the beginning to the end of the bankrupt's estate. The Court correctly held it was

only during the period the *trustee had title*, i.e., first meeting of creditors. *That demonstrates the kind of "control or custody", i.e., title.* As noted, in decedent's estate, no one but the heir (transferee) has title, at the instant of death by operation of law and not through the estate.

As to its construction of the statute of limitation:

6502(a) provides for suspension during the prohibition form *three* actions: 1, making the *assessment*; 2, making the *levy*; 3, filing *suit*. The Court's construction should include all three. The disjunctive *or* not only relates to levy and suit, but also to assessment. To be consistent, the Court should then make the statute read prohibited from making the assessment *and* a levy *and* a suit. The use of the disjunctive in 6503(a) related to the disjunctive in 6502(a), each as a separate remedy and not conjunctive. The two statutes are inter-related, one fixing the period, the other providing for its suspension. It would be inconsistent that 6502 provides for alternative remedies, i.e., levy *or* suit, separately and disjunctively and 6503 to *siamese* them only for the purpose of suspension.

The Court's construction of 6503 would make 6501(a) (assessments) read (since included in 6503(a)) instead of being made within three years, it would not have to be made *until the estate was closed and then six months thereafter and then three years*. It would make 6502(a) read the tax could be collected by levy or suit *after the closing of the estate plus six months plus six years*. It would make 6503(a) read the suspension during the *entire period of the estate, plus six months, after it was closed, plus six years*. It would make 6503(a) read "is prohibited from making the *assessment and* from collecting by *levy and a proceeding in Court.*"

That would eliminate all statute of limitations since suspension would be through the entire estate proceedings plus six months, plus six years and would nullify any reason and sense to 6501, 6502 and 6503.

Pr C 974 provides for the payment of tax by the representative before final distribution. It would be impossible to close any estate under that construction.

United States v. Vibradamp Corp. (Cal. 1966) 257 FS 934 involved the government's inactivity regarding a contract claim *until after the estate was closed and then its attempt to reach the individual representative. It was unsuccessful*. It is cited for the following (p. 935) "It requires little imagination to visualize the extent to which the validity of such a doctrine would impair the closing of probate estates *throughout the country*."

The Court in United States v. Woodmansee (9 CA 1978) 578 F.2d 1302, approached construction differently, i.e., ". . . under these particular facts, *equity dictates* the 10 year limitation period to apply" (in favor of the taxpayer).

Although Bowers v. New York & Albany Co. (1927) 273 U.S. 346 was cited by petitioner, the Opinion is silent regarding it.[25]

Conclusion.

There was not the "control or custody" which suspends the statute. This is so as to all decedents' estates. The more so this estate in view of the equity judgment.

It is submitted apparent that respondent eventually realized its inactivity and *elected* its remedy, i.e., by suit.

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[25]"The clause in controversy is 'no suit *or* proceeding for the collection of any such taxes . . . shall be begun, after the expiration of five years after the date when such return was filed.' The court said there were two methods to compel payment, one a suit which was judicial, the other distraint which was executive. "Proceeding" was used in both and was not synonymous. "*The purpose of the enactment was to fix a time beyond which steps to enforce collection might not be initiated. The repose intended would not be attained if suits only were barred, leaving the collector free at any time to proceed by distraint. In fact, distraint is much more frequently resorted to than is suit for the collection of taxes. The mischiefs to be remedied by setting a time limit against distraint are the same as those eliminated by bar against suit . . .*" (emphasis added).

Realizing it was barred, it sought to avoid it by the argument that filing its claim "commenced a proceeding in court." Its seasoned opinion and statement was that it had the *duty* to *act* within six years on the assessment by *either* levy or suit.

The claim is barred and therefore the remedy for its collection. ". . . the lien sought to be foreclosed is only an incident for the claim for taxes it secures; and that, the claim for taxes is barred, the lien falls with it." United States v. Stone (5 CA 1958) 257 F.2d 685, 7.

The federal statutes of limitations involved are the sovereign's self-imposed limitations on its greatest power ("the power to tax is the power to destroy") and a protection of taxpayers.

Certainly that self-limitation, based on fundamental justice declared by the sovereign, has been and will be frustrated by respondent's conduct, approved by the opinion, indefinitely, brought to termination *only if* and *when* respondent decides.

The opinion's construction gives respondent unlimited whim to deliberate (or indifferent) inactivity and permits it to "toy", in a cynical tactic, with taxpayers by failing or refusing to act within the statutory. (*i.e.* as respondent conceded, contrary to the opinion, to do its *duty* to *either sue* or *levy* within the 6 years.)

It could have sued or levied within the 6 years. It sued in 1976 and admits, and the opinion holds, it could have sued in 1964 (and received payment). It did not. *Why not?*

According to the opinion the statute has *still not run*; the estate cannot be closed!

Petitioner most urgently and respectfully prays that this Court grant certiorari in this case.

Respectfully submitted,

FALCONE AND FALCONE,

By: A. V. FALCONE,

Attorney for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellant, v. Dorothy Silverman, Administratrix, Estate of Fred R. Silverman, Deceased, Defendant-Appellee. No. 78-2169.

United States Court of Appeals, Ninth Circuit. June 16, 1980.

Rehearing Denied Aug. 21, 1980.

The United States sought to reduce an estate tax assessment to judgment, but the United States District Court for the Central District of California, Laughlin E. Waters, J., granted summary judgment against the Government and in favor of the administratrix of the estate of the decedent. The Court of Appeals, Sneed, Circuit Judge, held that: (1) what constitutes "a proceeding in court" within internal revenue statute allowing collection of tax by "a proceeding in court" if begun within six years after assessment presents question of federal law, but answer turns on nature, function and effect of filing claim under relevant local law; (2) in view of manner in which California Probate Code treats filing of claim against probate estate for purposes of applying California's own statutes of limitation, United States did not by filing claim against probate estate in California begin "a proceeding in court" within the federal statute; (3) United States could have initiated suit to obtain judgment against administratrix immediately after assessment of estate taxes, but such ability did not render inapplicable suspension provided by the federal statute; and (4) both commencement of suit and levying on property ought to be available before it can be said that collection procedures are unhindered, for purposes of suspension of limitation, but suspension should not exist when bar to levy is insubstantial, and presence of assets of decedent, substantial in value in relation to total value of decedent's estate, not subject to custody and control

of probate court will preclude suspension of running of federal limitation period.

Reversed and remanded.

Libero Marinelli, Jr., Dept. of Justice, Washington, D. C., for plaintiff-appellant.

A. V. Falcone, Los Angeles, Cal., for defendant-appellee.

Appeal from the United States District Court for the Central District of California.

Before CHAMBERS, SNEED and ALARCON, Circuit Judges.

SNEED, Circuit Judge:

This case involves a somewhat obscure, but nonetheless important, area lying at a junction of the federal law fixing the manner in which the United States collects estate taxes and the state law governing the probate of decedents' estates. While our resolution of the issues presented by this case does not elate us, we derive some satisfaction from our belief that it is required by Congress.

The United States seeks to reduce its estate tax assessment to judgment. It failed in the district court, which granted summary judgment against it and in favor of the appellee, administratrix of the estate of Fred R. Silverman. The district court concluded that collection by the United States of its properly assessed tax was barred by the lapse of more than six years between the assessment and this suit. In reaching this result the district court applied section 6502(a)

of the Internal Revenue Code,[1] and found that under the facts, the United States had not within six years after the assessment either levied on the property of the Estate or "commenced a proceeding in court." It also concluded that the running of the six year limitation period was not suspended while the assets of the decedent were subject to probate. As a consequence, in its view the United States obtained no benefit from section 6503(b) of the Code. I.R.C. § 6503(b).[2]

While we agree that the United States had not within the six year period "commenced a proceeding in court," we disagree with the view that section 6503(b) provides no benefit. As we see it, section 6503(b) suspends the running of the six year period so long as all or substantially all of the assets of the decedent are subject to the control or custody of the probate court.

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[1]Section 6502(a) provides:

Collection after assessment

(a) *Length of period.*—Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 6 years after the assessment of the tax, or

(2) prior to the expiration of any period for collection agreed upon in writing by the Secretary or his delegate and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release). The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. The period provided by levy shall not be extended or curtailed by reason of a judgment against the taxpayer. I.R.C. § 6502(a).

[2]Section 6503(b) provides:

Suspension of running of period of limitation

(b) *Assets of taxpayer in control or custody of court.*—The period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States or of any State or of the District of Columbia, and for 6 months thereafter. I.R.C. § 6503(b).

Therefore, we reverse the judgment of the district court and remand this case to it to determine whether under the principles this opinion enunciates the United States is entitled to prevail in its effort to reduce its assessments to judgment.

Our jurisdiction rests on 28 U.S.C. § 1291 (1976).

I

FACTS

The relevant facts, as revealed by the record, are quite simple. Fred R. Silverman died on August 18, 1963, and his will was admitted to probate in the Superior Court of the State of California for the County of Los Angeles on September 27, 1963. On November 4, 1964, the executor filed a federal estate tax return, and on November 27, 1964, an estate tax assessment was made. On October 20, 1965 and October 18, 1966, the government filed proofs of claim in the Superior Court for unpaid taxes in the amount of $50,026.30, plus unassessed interest and other statutory additions.[3] This claim was not approved by either the administratrix or probate judge and has not been paid. The United States commenced the present action to reduce its claim to judgment on December 6, 1976. The administratrix, on instructions by the probate court, resisted on the basis of section 6502(a). Probate proceedings have not been concluded.

II

EFFECT OF FILING CLAIM

The United States insists that by filing its claim in 1965 and 1966 it began "a proceeding in court" well within six years after its assessment. If this is correct, section 6502(a) provides no bar to its collection of the tax.

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[3]The estate tax assessment was made in the amount of $89,547.11. Partial payments by the estate have since reduced that liability to $50,026.30, plus unassessed interest and other statutory additions.

This is an issue that has been before a number of courts, state as well as federal, with conflicting results.[4] We agree with the court in *United States v. Saxe*, 261 F.2d 316, 319 (1st Cir. 1958), when it pointed out that, while what constitutes "a proceeding in court" presents a question of federal law, the proper answer turns on the "nature, function and effect" of filing a claim under the relevant local law which in the case before us is that of California. We believe California law quite clearly indicates that it would be improper to characterize for purposes of federal tax law the filing of a claim against an estate subject to probate as the commencement of a "proceeding in court."

We reach this conclusion on the basis of the manner in which the Probate Code of California treats the filing of a claim against the probate estate for purposes of applying its own statutes of limitation. Generally speaking, under California law the statute of limitation applicable to the type of claim being made is not tolled by filing a claim. Thus, section 714, Cal.Probate Code (West 1956), provides, *inter alia*, that upon rejection of a claim by the executor or adminstrator "the holder must bring suit in the proper court against the executor or administrator, within three months after the date of service of such notice if the claim is then due, or, if not, within two months after it becomes due; otherwise the claim shall be forever barred." This section, a so-called "nonclaim" statute, limits the otherwise generally applicable statute of limitation but does not extend it. *See Barclay v. Blackinton*, 127 Cal. 189, 193, 59 P. 834 (1899); *Berger v. O'Hearn*, 41 Cal.2d 729, 733, 264 P.2d 10 (1953); *Zapata v. Meyers*, 41 Cal.App.3d 268, 271, 115 Cal.Rptr. 854 (1974). The short period of this "nonclaim"

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[4]*See, e.g., In re Estate of Feinberg*, 18 N.Y.2d 499, 277 N.Y.S.2d 249, 254, 233 N.E.2d 780, 783 (1966); *United States v. American Casualty Co.*, 238 F.Supp. 36 (W.D.Ky. 1964); *United States v. Ettelson*, 159 F.2d 193 (7th Cir. 1947); *United States v. First National Bank*, 54 F.Supp. 351 (N.D.Ohio 1943).

statute operates independently of the statute generally applicable to the type claim involved. Moreover, it is filing the suit on the claim in the proper court, not the filing of the claim in probate proceedings, that marks the terminal date of the period, the duration of which will determine whether the claim is barred either by the "nonclaims" statute or the statute otherwise generally applicable.

Whatever doubt there may be about the inability of filing a claim in probate proceedings to suspend the running of California's generally applicable statutes of limitation was put to rest by the decision of the Supreme Court of California in *Berger v. O'Hearn*, 41 Cal.2d 729, 264 P.2d 10 (1952). In that case, as in the case before us, a claim against the estate was filed within the period provided by the generally applicable statute but no action was taken by the administratrix or the probate court with respect to the claim. Subsequent to the expiration of the period of time provided by the generally applicable statute of limitation the claimant brought suit on the claim against the estate. The suit was barred, the California Supreme Court held, notwithstanding the fact that the claim was filed within the applicable period and that the claim was not rejected until approximately two months before the suit was brought.[5] Filing the claim, even when joined with a failure to act on the claim until shortly

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[5]Though the generally applicable statute of limitation has a long time to run on *actions*, probate statutes generally require that *claims* be filed within a short time known as the nonclaim period. The representative is thus given an opportunity to quickly determine the obligations against the estate and the method of satisfying those obligations. *See generally Satterfield v. Garmire*, 65 Cal.2d 638, 641, 56 Cal.Rptr. 102, 422 P.2d 990 (1967); *Rupp v. Kahn*, 246 Cal.App.2d 188, 193, 55 Cal.Rptr. 108 (1966). In California, the period within which claims must be filed is four months after the first publication notice to creditors. Cal.Prob. Code § 700. A claim timely filed may be acted upon after the period expires. Cal.Prob.Code § 712. With respect to a claim presented to the representative but not acted on formally, the claimant at his option may, after 10 days, treat the inaction as a rejection and commence an action on the claim. *Id.* The absence of an election to treat inaction as a rejection prevents the operation of section 714.

before suit was filed, did not suspend the running of the generally applicable statute.

Given this structure of the California probate law we see no reason why filing a claim in a California probate proceeding should be characterized as "a proceeding in court" for purposes of section 6502(a). To so characterize the filing of a claim would impart to it a significance not accorded it by local probate law. Our conclusion, therefore, is the same as that reached in *United States v. Saxe, supra*, after its analysis of Massachusetts probate law.

III

SUSPENSION OF THE LIMITATION PERIOD

The second issue we confront is more difficult. The district court, in holding that the United States could derive no benefit from section 6503(b) of the Internal Revenue Code, said:

> "To allow § 6502(a) to be suspended during the pendency of a state probate proceeding could allow the United States an unreasonably long time in which to collect its taxes—in this case, for example, perhaps over 20 years. Moreover, the collection efforts of the United States are not hindered by a pending probate proceeding in California since a federal estate tax claim has priority in such a proceeding, *see* Cal.Prob.Code § 950(1); *Witkin Summary of California law,* Wills and Probate § 444 at 5886, and since the United States may always proceed by levy pursuant to 26 U.S.C. § 6331 et seq., a proceeding by levy would supercede any state probate proceeding. *See Hoye v. United States*, 277 F.2d 116, 119 (9th Cir. 1960).

Were we to agree entirely with the thrust of these observations, we also would hold the claim of the United States barred by the limitation provisions of section 6502(a). We do not so agree, however.

To begin with, we must accord significance to the amendment of section 6503(b) of the Internal Revenue Code by the Federal Tax Lien Act of 1966 which deleted the preexisting exceptions to the suspension of the running of limitations applicable to an estate of a decedent or an incompetent. *See* H.R.Rep.No. 1884, 89th Cong., 2d Sess. 22-23 (1966), U.S.Code Cong. & Admin.News 1966, p. 3722; S.Rep.No. 1708, 89th Cong., 2d Sess. 24, U.S.Code Cong. & Admin.News 1966, p. 3722 (1966). Presumably the general purpose of section 6503(b) is to eliminate any necessity on the part of the Treasury to attempt to seize property in the "control or custody" of a court in order to protect its tax claims. *See* H.R.Rep.No. 1337, 83d Cong., 2d Sess. 107, A415 (1954), U.S.Code Cong. & Admin.News 1954, p. 4025; S.Rep.No. 1622, 83d Cong., 2d Sess. 585, U.S.Code Cong. & Admin.News 1954, p. 4025 (1954). By providing originally for an exception applicable to the estate of a decedent or incompetent Congress perhaps then believed that the "custody and control" of courts in those instances was sufficiently different to make unnecessary the suspension. No explanation for the exception was given, however. In any event, it was removed in 1966. In doing so the Committee Reports of both the House and Senate recognized that "administrative collection procedures" were not available in the case of an estate of a decedent or incompetent and that the running of the period of limitations should be suspended in those instances as in all other cases in which the assets of the taxpayer are in the "control and custody of the court."

This recognition by Congress of the unavailability of administrative collection procedures in the case of an estate of a decedent is consistent with the longstanding position of the Treasury that it may not levy on assets of a decedent's estate while in the custody of the probate court. *See* G.C.M.

9991, X1-1 C.B. 135, 137 (1932). It is also consistent with the decision of the Supreme Court of the United States in *Markham v. Allen*, 326 U.S. 490, 66 S.Ct. 296, 90 L.Ed. 256 (1946). In holding that the Alien Property Custodian could bring suit in federal district court to obtain his share of a decedent's estate then in the course of probate administration, the Supreme Court carefully pointed out that the judgment of the district court left "undisturbed the orderly administration of decedent's estate in the state probate court." *Id.* at 495, 66 S.Ct. at 495. The Court concluded that to entertain the Custodian's suit did not mean that the district court was exercising probate jurisdiction nor would it amount to "an interference with property in the possession or custody of a state court." *Id.* Any judgment obtained by the Custodian, of course, would have to be accorded full faith and credit by the probate court.

It follows that each of the three branches of the federal government has evidenced concern about the need to avoid undue interference with the probate of decedents' estates by state courts. The elimination of the exception applicable to estates of decedents and incompetents by the 1966 Act further reduces the necessity of interference. We cannot ignore this action by Congress.

It follows that in this case the district court erred in stating that a levy by the United States pursuant to section 6331 "would supercede state probate proceedings." Nor does *Hoye v. United States, supra*, so hold. It merely held that the Controller of the City of Los Angeles was a "person" within the meaning of section 6332 of the Code of whom the Secretary could demand the surrender of property subject to levy. We know of no decision that has held a state probate court to be such a "person" nor are we prepared to so hold.

Therefore, while we recognize that the United States could have initiated this suit to obtain a judgment against the administratrix of Silverman's estate immediately after

the assessment of estate taxes, we nonetheless hold that this ability does not render the suspension of the running of limitations provided by section 6503(b) inapplicable. The Internal Revenue Code provisions dealing with the limitations provisions applicable to collection of taxes do not distinguish in a relevant manner between bringing suit and levying on property.[6] Both must be available before it can be said that collection procedures are unhindered.

The suspension should not exist when the bar to levy is insubstantial, however. This is recognized by applicable regulations which provide that the section 6503(b) suspension is applicable only when "*all or substantially all of the assets of a taxpayer* are in the control or custody of the court." Treas.Reg. § 301.6503(b)-1, T.D. 7121, 1972-2 C.B. 411, 412 (italics added). The presence of assets of the decedent, substantial in value in relation to the total value of the decedent's estate, not subject to the custody and control of the probate court precludes suspension of the running of the section 6502(a) period. The presence of substantial assets may be attributable to their passage from the

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[6]Section 6502(a) provides that a tax "may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun (1) within 6 years after the assessment of the tax." The commencement of a proceeding in court or a levy within the period satisfies the statute. Either method may be employed. Section 6503(a)(1) suspends the limitation period "for the period during which the Secretary or his delegate is prohibited . . . from collecting by levy or a proceeding in court." I.R.C. § 6503(a)(1). The suspension occurs when *either* levy or proceeding in court is prohibited. Had section 6503(a)(1) been stated conjunctively, rather than alternatively, a strong argument could be made that a prohibition against a levy would not suspend limitations so long as a proceeding in court could be brought. However, no such argument properly lies under the present language of section 6503(a)(1). This being the case, the phrase "the period of limitations on *collection after assessment*" (italics added), employed in section 6503(b), should be interpreted to embrace collection by either levy or court proceeding. Should either be barred by the fact that the assets are in control or custody of the court the suspension should operate. In this manner sections 6503(a)(1) and (b) are made consistent.

decedent by means other than his last will or partial distributions by executor or administrator.

Our holding is not inconsistent with what we believe is the spirit of *McAuley v. United States*, 525 F.2d 1108 (9th Cir. 1975). In *McAuley* we refused to read section 6503(b) to require a suspension of the running of the statute of limitations during the entire period of the bankruptcy proceeding because of the inevitable presence of property exempt from bankruptcy long before the termination of bankruptcy proceedings. Under these circumstances it could not be said that the Treasury's efforts to collect the taxes was hindered from the beginning to end of bankruptcy proceedings. By recognizing that the suspension is either initially precluded or lifted, as the case may be, by the presence of substantial assets not subject to probate, we also utilize the existence of hindrance or no in interpreting section 6503(b). This we believe reflects the spirit of *McAuley*.

We acknowledge that *McAuley* rejected, as we do not, the principle of having section 6503(b) suspension turn on whether all or substantially all the taxpayer's assets were subject to control and custody of a court. Special circumstances unique to bankruptcy proceedings justified this rejection in *McAuley*. We held that suspension "until six months after the date of the first creditors meeting, and for an additional six months thereafter as provided by section 6503(b)" accomplished the purpose of the section and avoided the necessity of making suspension turn on a difficult question of fact. *Id.* at 1114.

We cannot avoid this necessity in the case of a decedent's estate. There exists no property owned by the decedent at the date of his death exempt from death duties. Whether the property passed by will or otherwise only pertains to the extent to which his estate is subject to the control and custody of the probate court. Also a bankrupt survives bankruptcy; a decedent never endures the probate of his own estate. The bankrupt, as *McAuley* pointed out, thus can

acquire assets subsequent to bankruptcy from which the Treasury may be able to recover its taxes. A decedent, of course, cannot acquire post-death assets.

In *McAuley* we were concerned with the ability of the section 6503(b) suspension to extend the period of limitations applicable to collection of taxes for an unreasonable length of time. We are also concerned in this case. However, the features that distinguish the probate estate from that of bankruptcy and the clear mandate of Congress require our holding. What is needed is a means fair to the United States by which the executor or administrator unilaterally could lift the suspension prior to distribution of a substantial portion of the assets. It is the task of Congress, rather than the courts, to devise the technique, however.

Reversed and Remanded.

APPENDIX B.

Judgment.

United States Court of Appeals For the Ninth Circuit.

United States of America, Plaintiff-Appellant, vs. Dorothy Silverman, Administratrix, Estate of Fred R. Silverman, Deceased, Defendant-Appellee. No. 78-2169, DC# Cv 76-3763 LEW.

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Filed and entered June 16, 1980.

APPENDIX C.

Order Denying Petition for Rehearing En Banc.

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellant, v. Dorothy Silverman, Administratrix, Estate of Fred R. Silverman, Deceased. Defendant-Appellee. No. 78-2169.

FILED: Aug. 21, 1980.

Before: CHAMBERS, SNEED and ALARCON, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D.

Relevant United States Code Sections of Record in the District Court and Court of Appeals.

Relevant Sections of 26 USCA (West's):

§6324. Special liens for estate and gift taxes

(a) Liens for estate tax.—Except as otherwise provided in subsection (c)—

(1) Upon gross estate.—Unless the estate tax imposed by chapter 11 is sooner paid in full, or becomes unenforceable by reason of lapse of time, it shall be a lien upon the gross estate of the decedent for 10 years from the date of death, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

§6334. Property exempt from levy

(a) Enumeration.—There shall be exempt from levy—

(1) Wearing apparel and school books.—Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) Fuel, provisions, furniture, and personal effects.—If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $500 in value;

(3) Books and tools of a trade, business, or profession.—So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $250 in value;

(4) Unemployment benefits.—Any amount payable to an individual with respect to his unemployment (including any portion thereof payable with respect to dependents) under an unemployment

compensation law of the United States, of any State, or of the District of Columbia or of the Commonwealth of Puerto Rico.

(5) Undelivered mail.—Mail, addressed to any person, which has not been delivered to the addressee.

(6) Certain annuity and pension payments.—Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. 562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code.

(7) Workmen's compensation.—Any amount payable to an individual as workmen's compensation (including any portion thereof payable with respect to dependents) under a workmen's compensation law of the United States, any State, the District of Columbia, or the Commonwealth of Puerto Rico.

(b) Appraisal.—The officer seizing property of the type described in subsection (a) shall appraise and set aside to the owner the amount of such property declared to be exempt. If the taxpayer objects at the time of the seizure to the valuation fixed by the officer making the seizure, the Secretary or his delegate shall summon three disinterested individuals who shall make the valuation.

(c) No other property exempt.—Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a). Aug. 16, 1954, c. 736, 68A Stat. 784; Aug. 28, 1958, Pub.L. 85-840, Title IV, § 406, 72 Stat. 1047; June 21, 1965, Pub.L. 89-44, Title VIII, § 812(a), 79 Stat. 170; Nov. 2, 1966, Pub.L. 89-719, Title I, § 104(c), 80 Stat. 1137.

§6501. Limitations on assessment and collection

(a) General rule.—Except as otherwise provided in this section, the amount of any tax imposed by this title shall

be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

§6502. Collection after assessment

(a) Length of period.—Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 6 years after the assessment of the tax, or

(2) prior to the expiration of any period for collection agreed upon in writing by the Secretary or his delegate and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release).

The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. The period provided by this subsection during which a tax may be collected by levy shall not be extended or curtailed by reason of a judgment against the taxpayer.

§6503. Suspension of running of period of limitation

(a) Issuance of statutory notice of deficiency.—

(1) General rule.—The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or the collection by levy or a proceeding in court, in respect of any deficiency as defined in section 6211 (relating to income, estate, and

gift taxes), shall (after the mailing of a notice under section 6212(a)) be suspended for the period during which the Secretary or his delegate is prohibited from making the assessment or from collecting by levy or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60 days thereafter.

(2) Corporation joining in consolidated income tax return.—If a notice under section 6212(a) in respect of a deficiency in tax imposed by subtitle A for any taxable year is mailed to a corporation, the suspension of the running of the period of limitations provided in paragraph (1) of this subsection shall apply in the case of corporations with which such corporation made a consolidated income tax return for such taxable year.

(b) Assets of taxpayer in control or custody of court.—The period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States or of any State or of the District of Columbia, and for 6 months thereafter.

(c) Taxpayer outside United States.—The running of the period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period during which the taxpayer is outside the United States if such period of absence is for a continuous period of at least 6 months. If the preceding sentence applies and at the time of the taxpayer's return to the United States the period of limitations on collection after assessment prescribed in section 6502 would expire before the expiration of 6 months from the date of his return, such period shall not expire before the expiration of such 6 months.

(d) Extensions of time for payment of estate tax.—The running of the period of limitations for collection of any tax

imposed by chapter 11 shall be suspended for the period of any extension of time for payment granted under the provisions of section 6161(a) (2) or (b) (2) or under the provisions of section 6166.

(e) Certain powers of appointment.—The running of the period of limitations for assessment or collection of any tax imposed by chapter 11 shall be suspended in respect of the estate of a decedent claiming a deduction under section 2055(b) (2) until 30 days after the expiration of the period for assessment or collection of the tax imposed by chapter 11 on the estate of the surviving spouse.

(f) Extensions of time for payment of tax attributable to recoveries of foreign expropriation losses.—The running of the period of limitations for collection of the tax attributable to a recovery of a foreign expropriation loss (within the meaning of section 6167(f)) shall be suspended for the period of any extension of time for payment under subsection (a) or (b) of section 6167.

(g) Wrongful seizure of property of third party.—The running of the period of limitations on collection after assessment prescribed in section 6502 shall be suspended for a period equal to the period from the date property (including money) of a third party is wrongfully seized or received by the Secretary or his delegate to the date the Secretary or his delegate returns property pursuant to section 6343(b) or the date on which a judgment secured pursuant to section 7426 with respect to such property becomes final, and for 30 days thereafter. The running of the period of limitations on collection after assessment shall be suspended under this subsection only with respect to the amount of such assessment equal to the amount of money or the value of specific property returned.

APPENDIX E.

Relevant GCM 9991, X1-1 Cum. Bull 135, 137 (Cited by Respondent to the Court of Appeals and Cited in That Court's Opinion).

Accordingly, the conclusions of this office concerning the proper procedure against an administrator or executor are as follows:

1. Liens for Federal taxes in such cases should be perfected at the earliest possible date. Whether such liens should be made specific by compliance with the filing provisions of Revised Statutes, section 3186(b), depends upon the exigencies of the particular case, having due regard for the embarrassment caused the administration of the estate by such action.

2. In the ordinary case notice and demand should be promptly served on the administrator or executor to prevent distribution without notice. Such notice, as distinguished from proof of claim in accordance with the State practice, has two advantages, to wit:

(a) It makes it clear that the statutory limitation period continues to run, as such notice does not constitute the beginning of a suit or proceeding; whereas filing of proof of claim with the person or court designated by the State statutes may or may not be the beginning of a suit or proceeding to stay the statute.

(b) Since it does not amount to a suit or proceeding it does not constitute an election to submit the question of a State rather than a Federal court.

This general rule may be varied in the particular case by filing proof of claim and presenting the question to the State court in accordance with State probate procedure. However, such departure from the general rule indicated requires strict compliance with State procedure, and leaves the operation of the Federal statute of limitations dependent upon whether the action taken constitutes a suit or proceeding under State law.

3. If the administrator or executor does not voluntarily pay the tax upon notice and demand within the statutory period of limitation, suit should be timely brought in a Federal court. Execution on any judgment thus obtained should not be attempted but the judgment claim, which is binding on the probate court, should be filed as a claim with the person designated to receive claims by the State probate statutes.

C. M. Charest,
General Counsel, Bureau of Internal Revenue.

APPENDIX F.

Relevant Treasury Regulations or Procedure and Administration Cited by Respondent to the Court of Appeals and Cited in That Court's Opinion.

§301.6331-1 *Levy and distraint.*

* * *

(3) *Bankruptcy or receivership cases.* During a bankruptcy proceeding or a receivership proceeding in either a Federal or a State court, the assets of the taxpayer are in general under the control of the court in which such proceeding is pending. Taxes cannot be collected by levy upon assets in the custody of a court, whether or not such custody is incident to a bankruptcy or receivership proceeding, except where the proceeding has progressed to such a point that the levy would not interfere with the work of the court or where the court grants permission to levy. Any assets which under applicable provisions of law are not under the control of the court may be levied upon, for example, property exempt from court custody under State law or the bankrupt's earnings and property acquired after the date of bankruptcy. However, levy upon such property is not mandatory and the Government may rely upon payment of taxes in the proceeding.

* * *

§301.6503(b)-1 *Suspension of running of period of limitation; assets of taxpayer in control or custody of court.*

Where all or substantially all of the assets of a taxpayer are in the control or custody of the court in any proceeding before any court of the United States, or of any State of the United States, or of the District of Columbia, the period of limitations on collection after assessment prescribed in section 6502 is suspended with respect to the outstanding amount due on the assessment for the period such assets are in the control or custody of the court, and for 6 months thereafter. In the case of an estate of a decedent or an

incompetent, the period of limitations on collection is suspended only for periods beginning after November 2, 1966, during which assets are in the control or custody of a court, and for 6 months thereafter.

* * *